United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

BRIEF FOR RESPONDENT

76-4226

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITION FOR REVIEW OF ORDERS
OF THE CIVIL AERONAUTICS BOARD

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BRIEF FOR RESPONDENT

STATEMENT OF THE ISSUES

Over formal diplomatic objection of the United States, the United Kingdom unilaterally prescribed the frequency levels and equipment types that U.S. air carriers would be permitted to operate on U.S.-U.K. routes during the 1976-1977 winter season (November 1, 1976-April 23, 1977). This unilateral action followed the United Kingdom's denunciation (effective June 21, 1977) of the U.S.-U.K. Air Transport Agreement. The effect of the U.K. decree

was a reduction in the frequencies of National Airlines and Trans World Airlines in the Miami-London and Chicago-London markets, respectively, and a freeze on the frequencies being utilized by U.S. carriers in all other U.S.-U.K. markets. In response, the Civil Aeronautics Board invoked Part 213 of its Economic Regulations (14 C.F.R. 213)--which is a Presidentially-approved condition on the authority granted by the U.S. to British Airways to operate between the U.S. and the U.K.--by ordering British Airways to file its existing and proposed schedules, thereby subjecting them to possible disapproval in whole or in part by a subsequent Board order subject to review by the President. British Airways declined to comply. After further diplomatic negotiations, the U.K. (on October 8, 1976) retreated from the restrictions placed on U.S. carriers in the Miami/Chicago-London markets, and the schedule-filing order was vacated nunc pro tunc as of that date, leaving British Airways liable for its failure to comply with the order prior to that time. The Board's Bureau of Enforcement has instituted a proceeding against British Airways concerning those violations. That proceeding has been stayed by stipulation pending the outcome of the instant litigation. Docket 30352, British Airways Board, d/b/a British Airways.

In the Board's opinion, the dispositive questions are:

1. Whether petitioner's major contentions amount to a collateral attack on Part 213 and are therefore beyond the Court's review jurisdiction under Section 1006(a) of the Federal Aviation Act which precludes review of orders "in respect of any foreign air carrier subject to the approval of the President under Section 801" of the Act.

2. If reviewable, whether Part 213's authorization of schedule-filing orders (a) subjects foreign air carrier permits to unlawful alteration, modification, or amendment, and (b) violates Section 1102 of the Act because of inconsistency with the U.S.-U.K. Air Transport Agreement.

3. Whether the schedule-filing order was consistent with the Federal Aviation Act and Part 213.

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

Every nation exercises sovereignty over its own airspace, and governmental authorization is required for operations by the carriers of one country to and from the territory of another. Operations by foreign air carriers into the United States are governed by Section 402 of the Federal Aviation Act (49 U.S.C. 1372). 1/ That section provides for the issuance of a foreign air carrier permit upon Board findings relating to the "fitness" of the applicant for such a permit and to the public interest in the transportation the applicant seeks to perform. The Board may "attach to such permit such reasonable terms, conditions, or limitations as, in its judgment, the public interest may require" (Section 402(e)), and it may also alter,

1/ Relevant provisions of the Act are reproduced in Appendix A, infra.

amend, modify, suspend or revoke any permit when, after notice and hearing, that action is found to be in the public interest (Section 402(f)). Both the initial issuance and any subsequent amendment of a permit are subject to the approval of the President pursuant to Section 801 of the Act (49 U.S.C. 1461), and such orders are not subject to judicial review. See Section 1006(a), 49 U.S.C. 1486; Diggs v. Civil Aeronautics Board, 516 F.2d 1248 (C.A.D.C., 1975), cert. denied, 424 U.S. 910; Dan-Air Services, Ltd. v. Civil Aeronautics Board, 475 F.2d 408 (C.A.D.C., 1973); Pan American World Airways v. Civil Aeronautics Board, 392 F.2d 483 (C.A.D.C., 1968); British Overseas Airways Corp. v. Civil Aeronautics Board, 304 F.2d 952 (C.A.D.C., 1962).

Because of every nation's sovereignty over its own airspace, international air operations necessarily involve principles and problems of reciprocity. In many instances, the exchange of reciprocal operating rights is based on executive agreements between nations ("bilaterals") which specify the routes which the carrier or carriers of each signatory nation will be permitted to serve. Operations of U.S. and U.K. carriers are governed by such a bilateral--the United States-United Kingdom Air Transport Services Agreement, commonly called the "Bermuda Agreement", entered into in 1946 (J.A. 81).

Among the concepts on which reciprocal operating rights are based is the principle that there shall in fact be reciprocity of treatment of each country's carriers. Thus, the agreement provides "/t/hat there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories * * *" (J.A. 94).

It has been the historical position of the United States Government that, under Bermuda-type bilaterals, airline management should be free to determine for itself the appropriate capacity--schedule frequencies and equipment types--with ex post facto governmental review through diplomatic consultations in the event either country considers the capacity excessive. As the Department of State put it in a diplomatic note delivered to the U.K. authorities on March 10, 1976 (emphasis added):

> "Ever since the air services agreement between the United States and the United Kingdom came into effect on February 11, 1946, it has been common ground between the two governments that within the terms of the agreement neither party could predetermine the frequency at which the airlines of the other party should fly on any given route. Instead, the agreement established and has maintained a regime under which the airlines of each country are free, at the outset, to determine for themselves the levels of service offered to the public on the agreed routes, subject to ex post facto review by the two governments in the event problems are experienced. This meaning of the agreement was made explicit at the conclusion of the 1946 negotiations in a joint statement issued by the two delegations. It is a feature of the agree-

ment which the United States Government considers to be of fundamental importance to the aviation relationship between the United States and the United Kingdom. 2/

Notwithstanding the principles of reciprocity embodied in Bermuda-type bilaterals, and their policy against unilateral restrictionism, many countries unilaterally predetermine and restrict the capacity provided by foreign air carriers to and from points within their borders by exercising a power to disapprove schedules they have required such carriers to file with them. Prior to April, 1970, however, the United States possessed no means of imposing prompt, retaliatory restrictions on such a country's carriers. 3/ In that year, after notice and evidentiary hearings, however, the Board adopted a regulation (Part 213, 14 C.F.R. Part 213) setting forth the conditions under which the filing of the schedules of foreign carriers for possible disapproval could be required. The Board simultaneously issued an order approved by the President under Section 801 which amended the foreign air carrier permits of 48 foreign carriers--including

2/ The "joint statement" referred to in the quotation (reproduced as Appendix G, infra) provides that one of the basic principles of the Agreement is that there shall be no "* * * predetermination of frequencies or capacity [nor] * * * any arbitrary division of air traffic between countries and their national airlines * * *." See also the letter of President Richard M. Nixon to C.A.B. Chairman Secor Browne, dated June 3, 1970, approving Part 213 (J.A. 73).

3/ The only recourse was to Board proceedings under Section 402(f) to modify individual foreign air carrier permits by including a condition which would require that existing and proposed schedules be filed for approval and would subject them to disapproval.

British Airways' corporate predecessor, British Overseas Airways Corporation (BOAC)--"to make the exercise of the privileges granted by said permits subject to the provisions of said Part 213 * * *." 4/

BOAC challenged the Board's authority to take this action when it was first proposed. The D.C. Circuit dismissed the petition, saying that the proposal would be an order in respect of a foreign air carrier over which Section 1006 of the Act precluded review, "now or later." BOAC v. Civil Aeronautics Board, supra, 304 F.2d at 953.

In adopting Part 213 and amending foreign air carrier permits to subject them to the Part, the Board explained:

> "Part 213's schedule-filing and approval provisions will arm the Board with powers needed to combat foreign governmental restrictionism. The Board would prefer that neither this Government nor any other be equipped with the authority to predetermine capacity. But that state of affairs is not yet possible. The record demonstrates that there are a substantial number of countries which possess the power to require U.S. carriers to file schedules, that a number of them do not hestitate to exercise such powers, and that there have been unwarranted disapprovals of the schedules of U.S. carriers.
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> * * *
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> "The United States Government's lack of apt procedures for schedule approval has, the Board believes, encouraged other nations to take unwarranted restrictive action against United States carriers operating to their territory. For if a foreign government can limit the United States carrier's schedules, while the United States is unable to impose

4/ Order 70-6-32, approved by the President June 3, 1970. Order 70-6-32 and the accompanying opinion are reproduced in Appendix B, infra.

> prompt, reciprocal restrictions on that government's carrier, the foreign carrier will gain an economic advantage. So long as the United States is forced to follow procedures under which retaliatory action is long delayed, foreign governments will not regard the threat of United States retaliation as a serious deterrent. Only by adopting Part 213 can this Government increase the likelihood that other governments will abandon unilateral restrictionism." (Order 70-6-32, supra, pp. 3-4).

To allay the expressed concern that adoption of Part 213 "signaled a change in the United States' historic aviation policy * * * to one of unilateral restrictions" (App. B, p. 2), the Board made its intentions perfectly clear. The regulation as adopted modified the original proposal by providing "that the Board may issue a schedule-filing order in bilateral cases only if it finds that the carrier's government has, over this government's objections, restricted a United States carrier's rights provided for in an air transport /bilateral/ agreement" (id., at 6). Thus, the Board assured "our bilateral partners that the Board will not invoke the rule /Part 213/ unless those governments themselves first practice unilateral restrictionism" (ibid.).

In accordance with these assurances, Part 213 provides that it can be invoked only if the Board finds that:

> "* * * [T]he government of the [foreign air carrier permit] holder, over the objections of the United States Government, have: (1) taken action which impairs, limits, terminates, or denies operating rights, or (2) otherwise denied or failed to prevent the denial of, in whole or in part, the fair and equal opportunity to exercise the operating rights, provided for in * * * [a bilateral agreement], of any U.S. air carrier designated thereunder with respect to flight operations to, from, through, or over the territory of such foreign government." 14 C.F.R. 213.3(c).

After making such a finding, the Board may, where the public interest so requires, (1) order the foreign air carrier to file its existing schedules of service between any point in the U.S. and any point outside thereof and (2) require such carrier thereafter to file copies of proposed schedules of service between such points at least thirty days prior to the date on which such service is to be inaugurated.

Once a schedule-filing order has been issued, the foreign carrier may continue to operate existing schedules unless the Board issues an order "notifying the carrier that such operations, or any part thereof, may be contrary to applicable law or may adversely affect the public interest" (14 C.F.R. 213.3(d)). [5/] Schedules

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5/ If an existing schedule is disapproved, the foreign air carrier has 30 days within which to phase out the service.

proposed for the future may be inaugurated at the end of 30 days unless an order notifying the carrier of their disapproval is issued prior to inauguration. Any order requiring discontinuance of existing schedules or forbidding inauguration of proposed schedules may not be issued until it has been submitted to the President who, in turn, may stay or disapprove it within 10 days of its adoption by the Board (14 C.F.R. 213.3(d)).

B. Background of instant controversy.

As demonstrated, supra, air transport operations between countries are based on considerations of mutuality of operating rights and treatment. Thus, due to the inability of U.S. carriers and British Airways to reach an agreement respecting capacity levels to be provided on U.S.-U.K. routes during the 1976-1977 winter season, the governments of the U.S. and the U.K. engaged in consultations on the subject in the spring and summer of 1976. 6/ Before such consultations were concluded, however, and despite U.S. Government objections, the U.K. Government, by Note dated August 12, 1976 (App. C, infra) unilaterally prescribed the frequency levels and equipment types it would permit U.S. carriers and British Airways to provide on all U.S.-U.K. routes from November 1, 1976 to April 23, 1977. With respect to services

6/ On June 22, 1976, the U.K. Government had denounced the Bermuda Agreement effective June 21, 1977. It did so because the capacity principles embodied in the agreement do not guarantee an equal division of the traffic in U.S.-U.K. markets between the carriers of each country. Negotiations looking to a new bilateral have since been going on, and one of the principal obstacles to conclusion of a new agreement has been the U.K.'s insistence on such a division.

between London and six U.S. cities (Los Angeles, Boston, New York, Washington, Detroit and Philadelphia), the Note had the effect of freezing the capacity of the U.S. carriers at a level they had already planned to provide. However, in the London-Miami and London-Chicago markets, the Note had the effect of reducing the number of frequencies National Airlines and TWA had planned to operate. The Note thus unilaterally deprived the U.S. carriers of their right to determine for themselves--subject to ex post facto review through diplomatic consultations--the equipment they would use and the schedules they would follow during the period specified by the U.K. fiat. 7/

The orders issued by the Board in response to this unilateral action by the U.K. government are the subject of the instant appeal.

7/ This was not the first time during 1976 that the U.K. Government had imposed unilateral restrictions on capacity levels to be operated by U.S. carriers. In response to a similar prescription of capacity for U.S.-U.K. routes for the summer of that year, the U.S. Department of State delivered to the U.K. authorities the Note quoted in part at p.5-6, supra. As there indicated, the Department of State stressed the importance this Government attaches to the Bermuda principle of carrier-determined capacity followed by ex post facto review, and added:

> "In view of the foregoing, the United States Government regards the letters issued by the Department of Trade as inappropriate and unacceptable. They represent a unilateral action by that department which violates the air services agreement. Consequently, the United States Government expects Her Majesty's Government to withdraw the letters of capacity limitation directed to United States airlines and to refrain from any implementation of such limitations" (emphasis added).

The U.K. Government subsequently withdrew the restrictions.

C. The challenged Board orders

The principal Board order challenged by British Airways is Order 76-9-74, dated September 14, 1976 (J.A. 3). In that order the Board found, pursuant to the requirements of Part 213, that the U.K. government, by its Note of August 12, 1976, had taken action over the objection of the U.S. Government which would "* * * impair, limit, terminate, and deny operating rights and deny the fair and equal opportunity of U.S. carriers to exercise the operating rights provided for in the United States-United Kingdom Air Transport Services Agreement" (Order 76-9-74, at 2 (J.A. 4)). In this connection the Board stated that:

> "The effect of this unilateral action of the United Kingdom Government, if implemented, would be to unjustifiably reduce the number of frequencies planned to be operated during this period by National and TWA from Miami and Chicago, respectively, to London; to deprive all the U.S. carriers of their rights to determine their schedules in accordance with the provisions of the Agreement and to divert traffic which otherwise would be carried by U.S. carriers to British Airways." Id.

In these circumstances the Board concluded that the public interest required that the Board exercise its authority under Part 213 of the Economic Regulations to require British air carriers to file their existing and proposed schedules so that a determination could be made as to "* * * whether the operation

of such services * * * may be contrary to applicable law or may adversely affect the public interest" (Id). 8/

Of the five British carriers directed to file schedules, only British Airways, a U.K. Government-owned carrier, refused. 9/ Instead, the carrier requested that the Board stay the filing order pending judicial review. The Board, in Order 76-9-161, dated September 30, 1976 (J.A. 33), reviewed British Airways' arguments in support of a stay and determined to deny the motion in all but one respect. 10/ The Board found that the schedule

8/ Consistent with the requirements of Part 213 (14 C.F.R. 213.3), existing schedules were to be filed within seven days, and proposed schedules were to be filed thirty days in advance of the intended date for the inauguration of service.

9/ Petitioner's relationship to the U.K. Government is succinctly described in the Board order on petitioner's application for transfer to it of its corporate predecessor's Section 402 permit (Order 74-3-4 (March 4, 1974)):

> ". . . British Airways Board is a public corporation of the United Kingdom, and although British laws empower the Airways Board to create and issue stock with the consent of the Secretary of State for Trade and Industry, no capital stock or other security carrying voting rights has yet been issued. The United Kingdom government is the principal creditor of BAB and will continue as such after the acquisition of the property, rights and liabilities of BOAC and BEA on April 1, 1974. In matters of broad policy, BAB is subject to supervision of the Secretary of State for Trade and Industry and through him, ultimately to the Parliament of the United Kingdom" (emphasis added)

10/ Order 76-9-161 is the second order under review herein. It dealt with an additional London-Washington Concorde flight which petitioner had planned to inaugurate on October 5, 1976--less than 30 days after issuance of the filing order. Order 76-9-161 stayed the effective date of the filing order to October 6 insofar as it affected the new Concorde flight, thereby permitting that flight to be filed as an "existing" schedule.

filing order did not impose any significant adverse impact on British Airways. Specifically, the Board noted that the order would not, as alleged, prevent changes in equipment, routings or operational requirements necessitated by emergency conditions (J.A. 35). In the Board's view, "/a/dverse impact upon British Airways will result only from a subsequent order (subject to stay or disapproval by the President) actually disapproving" any schedules required to be filed (Id.).

In addition, the Board noted that British Airways' permit had been made subject to the schedule-filing-and-disapproval provisions of Part 213 after full hearings and Presidential approval, and therefore such provisions constituted a condition on the foreign air carrier permit issued to British Airways. The Board thus concluded that the schedule-filing order "constitute/d/ no deprivation of rights of the carrier" (J.A. 33, 34).

The Board also found that the equities of the matter required denial of a stay:

> "The British Government has unilaterally taken action which substantially impairs the operating rights of United States carriers under the United States-United Kingdom bilateral, despite the repeated objections of the United States Government, and clear warnings that retaliatory action under Part 213 would follow. * * * Under these circumstances, to stay the initial stage Part 213 order, which by itself is not final, but the stay of which could seriously impede United States Government retaliatory action designed to deter and remove the United Kingdom bilateral violations, becomes unthinkable, and clearly contrary to the public interest." (J.A. 34, 35) (footnote omitted).

Notwithstanding the Board's implementation of the Part 213 filing requirements, and representations by the State Department to the U.K. that the failure to withdraw restrictions on U.S. carrier operations would require an appropriate retaliatory response, the U.K. Government did not rescind its schedule limitations on U.S. carriers.

Consequently, and in accordance with representations made by the State Department to British authorities, the Board adopted an order to require British Airways to reduce its service between Los Angeles and London from seven to five weekly frequencies (J.A. 30). The order, which was subject to stay or disapproval by the President within 10 days under Section 213.3(d) of the Economic Regulations, found that a limitation on the schedules to be operated by British Airways was in the public interest and that operations in excess of those ordered would adversely affect the public interest. (Id. at 31).

While the proposed order reducing petitioner's Los Angeles-London service was pending at the White House, diplomatic negotiations over the dispute continued. Two days before the deadline for Presidential stay or disapproval of the Los Angeles-London order, the British authorities agreed on October 7 to rescind the restrictions imposed by their August 12 Note on U.S. carrier operations in the Miami-London and Chicago-London markets.

Confirmation of the settlement of the Miami/Chicago-London dispute was sent by the British authorities to the Department of State on October 8, 1976. 11/ As part of the settlement, the U.S. Government indicated that the Board's schedule reduction order would be disapproved by the President.

Subsequently, by letter dated October 9, 1976, the President advised the Board that "/i/n view of the fact that the issues necessitating the actions proposed in the /schedule-reduction/ order have been satisfactorily resolved with the British authorities, I am hereby disapproving the order" (J.A. 39). Further, the President determined that "* * * prompt rescission * * *" of the Board's schedule-filing order /76-9-74/ "* * * would be appropriate and in the interests of our foreign policy" (Id.).

In response to the President's views respecting the schedule-filing requirement of Order 76-9-74, the Board, on October 26, 1976, issued Order 76-10-110 (J.A. 62), the third order on review in this proceeding. It relieved British Airways of the obligation to file its schedules. However, in view of British Airways' failure to comply with the filing requirement while the dispute between the two countries was still pending, the Board determined not to absolve the carrier from enforcement liability under the

11/ The correspondence between the two governments is reproduced in Appendix D, infra.

Act for the failure to file schedules ** * * during the period the dispute 'necessitating' the orders remained unresolved, i.e., up to October 8, 1976" (J.A. 64). Orders 76-9-74 and 76-9-161 were otherwise "vacated and their effectiveness terminated nunc pro tunc as of October 8, 1976" (J.A. 65).

Thereafter the Board's Bureau of Enforcement filed a complaint and petition for enforcement arising out of British Airways' failure to abide by a Board order during the period ending with October 8, 1976 (Docket 30352, British Airways Board, d/b/a, British Airways). That proceeding has been stayed by agreement, pending decision in the instant litigation with British Airways agreeing not to contest the entry of a cease and desist order should the carrier lose on the merits.

ARGUMENT

Introduction

Petitioner's authority to operate to and from this country derives solely from the foreign air carrier permit granted pursuant to orders issued by the Board under Section 402 of the Act and approved by the President under Section 801. Such permits may contain conditions on the authority granted (Section 402(e)), and conditions may be added by permit amendments ordered by the Board (Section 402(f)) with the President's approval (Section 801(a)).

Petitioner's permit was so amended seven years ago by a Board order, adopted after notice and hearing as required by Section 402(f)), and approved by the President as required by Section 801(a). The amendment conditioned the permit by making the "exercise of the privileges granted by * * * [British Airways'] permit * * * subject to the provisions of * * * Part 213 * * *"(App. B., infra).

The 1976 orders involving the requirement that petitioner file its schedules implemented that condition of the carrier's permit. It is therefore important to stress that it is those orders which are under review. The 1970 amendment of petitioner's permit to include the Part 213 condition is not before the Court, and having been approved by the President, would not in any event be subject to review. Thus, while we do not contend that the schedule-filing order is unreviewable, the only reviewable issue is whether that order is consistent with petitioner's permit condition, i.e., with Part 213 itself. The validity of Part 213 is not and cannot be in issue.

We will first set forth the reasons for the non-reviewability of Part 213. We will then show that, for the most part, petitioner's contentions are in reality attacks on Part 213 and hence not cognizable by the Court. Finally, we will show that those contentions, as well as the few which may be deemed open for review, are in any event not well taken.

I. The validity of Part 213 is beyond the Court's review jurisdiction and most of the assertions of error are challenges to Part 213

A. The Court has no jurisdiction to review Part 213

While providing generally for review of "any order * * * issued by the Board * * * under this Act * * *," Section 1006 specifically "except[s] any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801." The order adopting Part 213 ("Terms, Conditions and Limitations of Foreign Air Carrier Permits") and making existing permits subject to Part 213 was, as we have seen, such an order. It follows that the Court lacks

jurisdiction to review those claims which really amount to attacks on the validity of Part 213. 12/

The foregoing conclusion hardly needs support, but ample judicial authority is not lacking. As previously noted (supra, p. 7), petitioner's corporate predecessor BOAC petitioned for judicial review when the Board first proposed adopting Part 213 and amending foreign air carrier permits to make them subject to it. BOAC there conceded that its attacks on the Board's power to adopt the proposal "will not be reviewable as an incident to any judicial review of the ultimate orders entered in the proceeding * * * because such ultimate order will be subject to the approval of the President and hence expressly exempted from the reviewing jurisdiction of this Court" (citing Section 1006(a)). Petitioner's Answer to Respondent's Motion to Dismiss, p. 6, No. 16640, D.C. Cir., filed November 17, 1961. Pointing to the Section 1006

12/ Petitioner's assertion (Br. pp. 25-26) that Part 213, "as invoked by the Board", is not a condition on its permit is wholly without substance. It says that clause (2) of Section 213.3(c) of the regulation was adopted after its permit was subjected to Part 213. That is true--clause (2) was added in 1974--but this affords no basis for petitioner's conclusion. The short answer is that the schedule-filing order is based principally on findings required by Section 213.3(c) as originally adopted, i.e., on the findings specified in clause (1) (See J.A. 4). Secondly, the amendment did no more than "clarify the regulation to leave no doubt that its provisions could be invoked under circumstances whereby action or inaction of the foreign government, or its aeronautical authorities, resulted in the failure to maintain a fair and equal opportunity for U.S. carriers to exercise their bilateral rights, even though such action (or inaction) in contravention of bilateral obligations fell short of a direct restriction upon the exercise of such rights" (ER-870, 39 F.R. 30842, emphasis added). Here, of course, the U.K. action was a direct restriction and thus was clearly covered by Part 213 before the clarifying amendment. Finally, even if deemed substantive and hence a modification of the condition on petitioner's permit privileges, the 1974 amendment was approved by the President under Section 801 and hence is unreviewable or, if reviewable, was reviewable within 60 days of its adoption, not three years later.

exclusion of review jurisdiction in the case of orders "in respect of any air carrier subject to the approval of the President as provided in Section 801 * * *," the Court stated that there could be no review "now /at the interlocutory stage/ or later." BOAC v. Civil Aeronautics Board, supra, 304 F.2d at 953 (emphasis added). 13/

More recently, the D.C. Circuit reached the same conclusion in a case remarkably similar to this one. Dan-Air Services, Ltd. v. Civil Aeronautics Board, supra, involved a Board order implementing a condition in a charter carrier's foreign air carrier permit. The condition provided that the Board could, upon specified findings, require the carrier to file for advance approval of all charter flights at least 25 days prior to departure date and forbid the operation of a flight for which approval was not obtained. As here, most of the assertions of error amounted in reality to assaults on the condition itself. As to this the court ruled (475 F.2d at 411-12):

> "In reviewing the Board's actions, we note preliminarily that the specific terms of condition (5) are beyond the jurisdiction of this court to review, since Section 1006(a) of the Federal Aviation Act (49 U.S.C. §1486(a)) explicitly excepts from this court's review "any order in respect of any foreign air

13/ While petitioner relies on a subsequent case in which the D.C. Circuit characterized the "or-later" language as dictum, that was in a case involving a U.S. citizen carrier. In still later cases involving foreign carriers, the same court stressed that BOAC meant exactly what it said. See Pan American World Airways v. Civil Aeronautics Board, supra, 392 F.2d at 493.

> carrier subject to the approval of the President as provided in Section 801 of this Act," * * * The permits issued to petitioners were such orders under Section 801 and were duly approved by the President. Accordingly, review of such orders in respect of foreign air carriers is clearly precluded by statute. Pan American World Airways v. C.A.B., 129 U.S. App. D.C. 159, 169, 392 F.2d 483, 493 (1968); British Overseas Airways, Corp. v. C.A.B., 113 U.S. App. D.C. 76, 304 F.2d 952 (1962); see also C.A.B. v. Donaldson Lines, 343 F.Supp. 1059 (S.D.N.Y. 1972) * * *." (footnotes omitted)

That holding is clearly applicable here.

Neither American Airlines v. Civil Aeronautics Board, 348 F.2d 349 (C.A.D.C., 1965), nor Pan American World Airways v. Civil Aeronautics Board, 380 F.2d 770 (C.A. 2, 1967), aff'd, 391 U.S. 461 (1968), both cited by petitioner, is apposite. Both involved orders respecting U.S. citizen carriers which were subject to Presidential approval, and in both review was held available to determine whether the orders in question were ultra vires, i.e., in excess of statutory power. Such orders are not within the statutory foreign-air-carrier exception involved here. Those cases involve the Supreme Court's holding that such orders were nevertheless unreviewable on their substantive merits because constitutional considerations rendered such review inappropriate. C. & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948).

In those cases, unlike this one, review was not precluded by statute but by judge-made rule. Thus, in the American and Pan American cases the courts held that the considerations upon which Waterman rested did not preclude review of the issue of statutory power. Here, in contrast, it is not a judicial opinion which precludes review of the conditions in petitioner's operating authority, but an express withholding of jurisdiction by Congress and that withholding obviously must be respected.

These distinctions have found judicial acceptance. For example, Pan American World Airways v. C.A.B., supra, 392 F.2d 483, involved a contention that a Board order in respect of a foreign air carrier approved by the President under Section 801 was in excess of statutory authority. Pan American relied on the "ultra vires exception" to Waterman as the foundation for review jurisdiction. The D.C. Circuit found the "obstacles" to Section 1006 jurisdiction "formidable" "even if the Board * * * did exceed its statutory authority" (392 F.2d at 495, 493). Commenting on its own and this Court's "ultra vires" decisions, the D.C. Circuit pointed out that they (p. 493):

> "involved orders with respect to citizen air carriers subject to Presidential approval. Consequently, in those cases any putative limitation on * * * review stems from the Waterman gloss on Section 1006, not from Section 1006 itself; for in Waterman nonreviewability is premised merely on Presidential approval, not on explicit statutory language.
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> * * *

> "But where a foreign air carrier is involved, the issue is not whether the reach of the statute should be extended beyond its apparent coverage because of considerations of national defense and foreign policy; rather it is whether an exception should be carved from the plain language of the statute itself. Certainly * * * /the "ultra vires cases"/ are not dispositive where this latter question is at issue. And in British Overseas Airways Corp., which did involve the reviewability of an order with respect to a foreign air carrier, relying on the plain language of Section 1006, we said that there could be no direct review in this Court 'now or later'" (emphasis added).

While the D.C. Circuit avoided a square ruling on the jurisdictional issue by determining that the order in question was not ultra vires, its reasoning led to a square ruling in Diggs v. C.A.B., supra, 516 F.2d 1248, another case involving an order "in respect of a foreign air carrier." Rejecting the applicability of the "ultra vires cases", the Court held "that the clear and unambiguous language in Section * * * 1006(a) * * * deprives us of jurisdiction to review the challenged order" (516 F.2d at 1249). 14/

14/ Petitioner's reliance on the "ultra vires" cases for the proposition that Section 1006 does not preclude review of the schedule-filing order is simply unnecessary. As previously noted, we do not urge that Section 1006 precludes review to determine whether a schedule-filing order is consistent with Part 213; our point is that the Court lacks jurisdiction to consider contentions that call Part 213 itself into question.

In sum, it is clear that the Court has no jurisdiction to review Part 213 directly, let alone collaterally.

B. Petitioner's major contentions are in reality attacks on Part 213 precluded by the Section 1006 limitation of review jurisdiction

Petitioner's fundamental contentions are that the schedule-filing order violated Sections 402(f), 801(a), and 1102 (49 U.S.C. 1502) of the Act. Section 402(f) was violated, it says, because the schedule-filing order amounts to an "alteration, modification, amendment, or suspension" of its permit without the hearing that that section requires for such action. Relying on the same rationale, petitioner assails the order because it was not submitted to the President for his approval as required by Section 801(a) in cases of foreign air carrier permit amendment, modification, etc. The alleged violation of Section 1102, which requires that Board action be consistent with agreements between the United States and foreign countries, is the asserted deprivation of petitioner's right under the Bermuda Agreement to a "fair and equal opportunity to operate on any route covered by the Agreement * * *" (J.A. 94).

On its face, Part 213 contains no hearing requirement. Moreover, there is no suggestion in Part 213 that each schedule-filing order is to be submitted to and approved by the

President. [15/] Thus, in terms of petitioner's assertions of violations of Sections 402(f) and 801(a)--lack of hearing and absence of Presidential approval--it is clear that the Board's procedures were in strict accordance with the literal and unambiguous terms of Part 213 which, it bears repeating, is a Presidentially-approved condition on petitioner's permit insulated from judicial challenge.

This leaves the contention that the schedule-filing order violated Section 1102 because it was, so the argument runs, inconsistent with the "fair-and-equal-opportunity" provision of the Bermuda Agreement. In terms, however, Part 213 contemplates schedule-filing orders directed to carriers of countries with which the United States has Bermuda-type bilaterals. Its approval by the President therefore represents his determination that such orders, based on the findings (made in this case) required by

15/ This is in marked contrast to Part 213's treatment of "phase two" orders, i.e., those disapproving an existing or proposed schedule, which must be submitted to the President and are subject to his stay or disapproval.

Section 213.3(c), do not violate the bilateral. Thus, the Board's order was in strict accord with Part 213's treatment of bilaterals.

In light of this analysis, the true nature of petitioner's major contentions becomes painfully evident. Insofar as the alleged violations of Sections 402(f) and 801(a) are concerned, the real contention is that the Presidentially-approved Part 213 permit condition is invalid because it authorized the Board to proceed as it did. Insofar as the alleged violation of Section 1102 is concerned, the real contention is that, because it authorizes a schedule-filing order having asserted impact on a carrier, Part 213 is inconsistent with the bilateral notwithstanding the contrary determination by the President embodied in Part 213. 16/

16/ Part 213's embodiment of the President's determination that schedule-filing orders do not violate Bermuda-type agreements is answer enough to petitioner's question-begging argument (Br. pp. 35-36) that the attack under Section 1102 is not an attack on Part 213. We nonetheless pause to show other infirmities in that argument. It rests on statements made when Part 213 was first proposed in 1961 in which the Board stressed that it would not act inconsistently with bilateral obligations if the regulation should ultimately be adopted. (34 C.A.B. 838, 839). What the Board was addressing, however, was second-stage orders--those disapproving schedules (which under the original proposal would not have been reviewed by the President):

(Footnote continued)

There is, in sum, no escaping the conclusion that, to a large extent, petitioner's case rests on propositions which, for the reasons heretofore given, are not open to review under Section 1006 of the Act. 17/

Footnote continued--

> "We find it unnecessary here to determine whether there may be situations in which action by the Board disapproving schedules or equipment would be inconsistent with an obligation that the United States has assumed under a particular agreement. The important point is that there are many actions the Board could take in various situations under the regulation without raising this problem. The mere possibility that there may be specific situations in which the Board could not properly act under the regulation does not impair the Board's power to promulgate such a regulation or affect its validity under the Act." (Order E-17235, 34 C.A.B. 840, 844). (Emphasis added).

There is no second-stage order before the Court.

17/ With respect to the asserted violations of Section 402(f), and 801(a), petitioner points out (Br. 33) that Part 213 does not forbid a hearing or submission of a schedule-filing order to the President. It reasons from this, as we understand the argument, that in this instance the Board should have held a hearing and submitted the order to the President, and that failure to do so violated Section 402(f) and 801(a). It follows, according to petitioner, that these assertions of procedural error are not collateral attacks on Part 213.

The leap from failure to follow procedures permitted, but not required, by Part 213 to the conclusion that such failure violated the Act, is a non sequitur. Since Part 213 authorized the procedures followed, contentions that those procedures violated the Act necessarily go to the validity of Part 213 itself. Failure in a given case to follow alternatives authorized by Part 213 would, at worst, be a violation of Part 213, not the Act (and, as we subsequently show, there was not even a Part 213 violation here).

II. There is no legal infirmity in Part 213 even if reviewable, or in the schedule-filing order.

A. The attacks on Part 213

The procedural contention, as we have seen, is that the schedule-filing order, though adopted in complete accordance with Part 213, effected an alteration, modification, or amendment of petitioner's permit without observance of the hearing requirement of Section 402(f) and without the Presidential approval required by Section 801(a) for such action. The dispositive answer is that there has been no such action.

As explained above, petitioner's permit was amended not by the schedule-filing order but by a 1970 order which expressly made "the exercise of the privileges granted by said permit * * * subject to the provisions of * * * Part 213 * * *" (App. B). Section 213 had thus long since become a condition of petitioner's operating authority placed in that authority after full compliance with Sections 402(f) and 801(a). Since 1970, therefore, that authority has been subject to the possibility that a schedule-filing order might be found necessary in the public interest. It follows that implementation of this condition is merely enforcement of the permit in accordance with its literal terms and thus in no way diminishes the authority granted thereby. As the D.C. Circuit said in Dan-Air, supra, 475 F.2d at 413:

> "Again, the simple answer is that the invocation of condition (5) was not in any realistic sense a revocation, modification or suspension of permits which were issued subject to this express condition enabling the Board to take this very action. This order is in complete accordance with the provisions of these permits and in no way diminishes their operating authority." 18/

18/ Petitioner's efforts to distinguish Dan-Air are unavailing. The fact that the permits in that case contained the condition from the time of issuance is irrelevant. The condition with which we are here concerned was added seven years ago by amendment after full compliance with Sections 402(f) and 801(a). Nor is a different result justified because the Dan-Air condition's purpose differed from the purpose of Part 213.

We also note in this connection that the parade of horribles said by petitioner to attend a schedule-filing order is largely illusory. Obviously, the filing of existing schedules has no impact. The 30-day advance-notice requirement with respect to schedule changes could have impact, but its effects are certainly manageable. And, as the Board said in Order 76-9-161 (J.A. 35), "[t]he order would not, as speculated, preclude true emergency changes concerning rerouting or changes in equipment type and the like. It does not purport to constitute a preclusion against emergency deviations as a result of unanticipated operational requirements." Moreover, a carrier subject to a Part 213 schedule-filing order is always free to ask for a waiver of the 30-day notice requirement, and such requests have often been granted. For example, the Equadorian airline is subject to a Part 213 schedule-filing order. On November 11 and 18, 1976, it filed proposed schedule changes and requested a waiver of the 30-day requirement to put the changes into effect on December 1. It also sought permission to operate extra sections between Equador and New York on December 6 and 13. Both requests were granted (App. F, infra).

Since it rests on the view that the schedule-filing order was an amendment or modification of the permit, petitioner's contention that the order is invalid for want of Presidential approval under Section 801(a) also falls. The same contention was rejected in Dan-Air in the following words (475 F.2d at 412):

> "There is no merit to this contention since the implementation of condition (5) in no way could modify or diminish the scope of an operating permit which at all times was subject to that condition. Moreover, the President had expressly approved the permits containing condition (5) which by its terms cannot be read to contemplate another Presidential approval of its invocation." 19/

Petitioner places heavy reliance (Br. 26-28) on Civil Aeronautics Board v. Delta Air Lines, 367 U.S. 316 (1961). That case, however, is far wide of the mark. There the Board had

19/ Petitioner's argument (Br. 29-30) based on the absence of a formal delegation of power by the President is thus irrelevant. We nonetheless observe that petitioner is mistaken in asserting that there could be no delegation if one were necessary. See 3 U.S.C. 301.

Wholly apart from a Presidentially-approved condition, moreover, the implementation of which requires no further submission to the President, there are various actions the Board can take with respect to international route authority without obtaining the President's approval. Northwest Airlines v. C.A.B., 539 F.2d 749, 752 (C.A.D.C., 1976); Pan American World Airways v. C.A.B., 261 F.2d 754, 756 (C.A.D.C., 1958), cert. denied, 359 U.S. 912.

granted Delta unconditioned authority to operate between certain points and had permitted that authority to go into effect. Subsequently, in response to petitions for reconsideration of the award, it determined to impose a condition which would have restricted Delta's authority to operate between the points in question. The Supreme Court held that this was a modification of the unconditioned authority which called into play the certificate amendment procedures.

The distinction is clear and decisive. In Delta there was a condition imposed on effective unconditioned operating authority, thereby taking away something previously granted. Here, in contrast, the condition has been in petitioner's operating authority for many years and its mere implementation thus neither takes away nor changes anything.

This brings us to the argument that Part 213 violates Section 1102 of the Act because it authorizes a schedule-filing order that assertedly deprives the foreign air carrier of the benefits of the "fair-and-equal-opportunity" provision of the bilateral. Petitioner is plainly wrong.

"Many foreign governments" with which the United States has bilateral agreements assert the right and exercise the power to require U.S. carriers to file their schedules for advance approval (Order 70-6-32, App. B, infra). Indeed the United Kingdom has done so.[20/] The contention that a schedule-filing requirement violates the bilateral is thus at odds with the practical construction of the Bermuda-agreement by "many foreign governments", including petitioner's own.

The contention is likewise at odds with this country's practical construction of the bilateral embodied in Part 213. As we have already pointed out, Part 213 in terms calls for schedule-filing orders directed to carriers of countries with which the United States has Bermuda-type agreements. Its approval by the President thus represents a determination by the political branch that such orders do no violence to Bermuda principles (at least in Part 213 circumstances).

In light of this international practice, and especially of the practice of the two governments immediately concerned, petitioner's argument is, in effect, that its own government and

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20/ A permit (reproduced as Appendix E infra) the U.K. has issued to one U.S. carrier, Seaboard World Airlines, contains a condition requiring schedules to be filed 60 days in advance and prohibiting their operation unless approved "with or without modification by the Secretary of State."

the Government of the United States are wrong in their interpretation of the bilateral. As such, it faces a steep up-hill climb. In ascertaining what international agreements permit, the courts "look * * * to * * * [the] practical construction of it" by the contracting parties. Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933).[21/] Moreover, the construction of the political department of this government is "of weight" (id., at 295), indeed "great weight". Kolovrat v. Oregon, 366 U.S. 187, 194 (1961). See also, Charlton v. Kelly, 229 U.S. 447, 468 (1913) ("much weight"); Restatement, supra, §151 ("great weight"). There is, in addition, a "general principle of judicial deference to administrative interpretation," and "where legislative directives

21/ See also, Restatement (Second) of the Foreign Relations Law of the United States, §147(1)(f) (1965); see also McNair Law of Treaties (1961), 424. Speaking of the "effect of the subsequent practice of the parties", Lord McNair states:

> "Here we are on solid ground and are dealing with a judicial practice worthy to be called a rule, namely, that, when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion. This is both good sense and good law."

and constitutional considerations combine to circumscribe, if not eliminate altogether, the judiciary's reviewing role, extraordinary deference" is required. Pan American World Airways v. Civil Aeronautics Board, supra, 392 F.2d at 496. 22/

Petitioner's contention that the political department of the U.S. Government is wrong is in any event without substance. Part 213, the Court will recall, provides for a schedule-filing order against a bilateral carrier only upon a determination that the carrier's government has, over the U.S. Government's objections, breached the bilateral. In other words, as the Board said in adopting Part 213, the rule cannot be invoked

22/ As the Restatement explains (§152), "[t]he judiciary, when interpreting an international agreement, must take into account the fact that every agreement to which the United States is a party which becomes involved in domestic litigation has two aspects: (i) its international aspect, which is not the charge of the courts under the Constitution, and (ii) its internal aspect as the law of the case before the court." The principles described in the text apply to the latter aspect, and "the significance of the ['great weight'] rule * * * is that the courts should proceed with caution in interpreting international agreements, to make sure that they have as complete a realization as possible of the implications of their decision, both internationally and nationally" (ibid).

Where the "international aspect" of the agreement is involved in domestic litigation, a "political question" is presented which the courts will not decide. A "political question" includes "[w]hether a foreign power has violated a treaty with the United States and the effect thereof." Restatement, supra, §152.

"against their [our bilateral partners'] carriers unless those governments themselves first practice unilateral restrictionism" (App. B, infra).

A schedule-filing order is the preliminary cog in the integrated process--established, it is worth repeating, by the President through his approval of Part 213 as a foreign air carrier permit condition--for the United States Government to respond to the foreign government's breach of the bilateral. Such an order positions the United States to take reciprocal action against the foreign government by issuance of a subsequent "phase-two" order (which the President may disapprove or stay), i.e., an order disapproving the foreign carrier's schedules, existing or proposed, in whole or in part.[23/]

A determination by the Executive Branch that a unilateral capacity limitation by a foreign government is a breach of the bilateral warranting a phase-two response by this nation would,

23/ A second-phase order under Part 213 cannot issue until the President has had ten days to decide whether to stay it, disapprove it, or by failure to do either, to permit it to issue and take effect (14 C.F.R. 213.3(d)).

as petitioner apparently concedes (Br. 31-33), obviously be consistent with settled principles of international law. 24/ The propriety of that determination, moreover, would in any event be a "political question" beyond the competence of the courts. Restatement, supra; Whitney v. Robertson, 124 U.S. 190, 194-195 (1888). We recognize, of course, that there is no phase-two order before the Court. The point is that, given the undoubted propriety of such an order under recognized principles of international law (to say nothing of the political character of a determination to impose a reciprocal sanction), it is self-evident that a schedule-filing order, which does no more than set the stage for possible sanctions, does not violate the bilateral and hence does not violate Section 1102.

24/ See 14 Whiteman, Digest of International Law 468 (1970):

> "The great majority of writers recognize that the violation of a treaty by one party may give rise to a right in the other party * * * to suspend the performance of its own obligations under the treaty. A violation of a treaty obligation * * * may give rise to a right in the other party to take non-forcible reprisals and these reprisals may properly relate to the defaulting party's rights under the treaty" (Quoting the International Law Commission of the United Nations).

Lord McNair has observed that "the retaliatory suspension of performance of /a/ corresponding provision in a treaty * * * illustrates one of the most important * * * sanctions behind international law--namely reciprocity * * *. No State can claim from other States, as a matter of binding obligation, conduct which it is not prepared to regard as binding upon itself." McNair, Op Cit., p. 573.

B. The attacks on the Board's order as inconsistent with Part 213

As we have indicated, supra at 18 , the Board does not contest the Court's jurisdiction to review a schedule-filing order for its compliance with the requirements of Part 213. We demonstrate below, however, that the filing order challenged here was in no respect defective under the regulation.

Part 213, to repeat, can only be invoked by the Board in response to an act of unilateral restrictionism against a U.S. air carrier by the government of a foreign air carrier permit holder. Specifically, the Board must find that such a government has, over the objections of the U.S. Government, "(1) taken action which impairs, limits, terminates, or denies operating rights, or (2) otherwise denied or failed to prevent the denial

of, in whole or in part, the fair and equal opportunity to exercise the operating rights, provided for in /a bilateral agreement/, of any U.S. air carrier designated thereunder with respect to flight operations to, from, through, or over the territory of such foreign government." (14 C.F.R. 213.3(c)).

The Board made the findings required by Part 213. It found that the U.K.'s unilateral predetermination of U.S. carriers' schedules in the August 12, 1976 Note (App. C, infra) had been made over the U.S. Government's objections. The Board also found that the U.K.'s action deprived U.S. carriers of their right under the Bermuda agreement to determine for themselves their schedules between London and eight U.S. cities and effectuated a reduction in the level of service planned to be operated by U.S. carriers in two U.S.-London markets. 25/

25/ The Board further found that the effect of such predetermination of U.S. carriers' schedules and capacity would be "* * * to divert traffic which otherwise would be carried by U.S. carriers to British Airways" (J.A. 4). This finding can best be understood by illustration. Consider, for example, a market in which two carriers are competing. The level of service (i.e., number of flights or frequencies) each carrier schedules will vary with traffic demand. Thus, a carrier will increase its frequencies when its load factors (normally computed on an average basis) are high (i.e., when the number of passengers is high in relation to the number of seats being offered) to avoid turning away passengers during peak periods, and decrease frequencies when load factors are low, to avoid flying near-empty planes. If, for purposes of this example, one of the two carriers in the market is carrying most of the traffic (i.e., its load factors are higher than its competitor's), a limitation on the number of frequencies either carrier can schedule will divert passengers to the carrier with low load factors because the other carrier would be unable in peak periods to accommodate all requests for its services and would also be unable to accommodate any increase in demand. The result, over the long run, would be an equalization of load factors (or market share) for both carriers.

(Footnote continued)

This, the Board concluded, impaired, limited, terminated and denied U.S. carriers' operating rights and deprived them of the benefit of the fair and equal opportunity provision of the bilateral.

The Board's findings in these respects were fully supported. Petitioner concedes that the U.K. action was taken over this government's objection (Br. 4). Moreover, while petitioner questions the propriety of a Board determination that the U.K. action breached the bilateral (as opposed to one by the executive branch), the fact is that the executive branch had already made that determination.

The Board found--and petitioner does not contend otherwise--that the Department of State's position was "that the British action was considered to constitute a serious violation of the /Bermuda Agreement/, and would, in the absence of withdrawal, be the subject of U.S. Government retaliatory action under Part 213 * * *" (J.A. 36). Indeed, the President himself acknowledged that resort to Part 213 had been "necessitated" by the U.K. action. See J.A. 39. Furthermore, the court will recall

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Footnote continued--

As we have noted, supra at n. 6, the U.K. government has denounced the current bilateral for the very reason that the "fair and equal opportunity" clause of the bilateral does not guarantee the carrier of any country an equal share of a given market. Indeed, in 1946 the U.S. and U.K. governments jointly declared that "any arbitrary division of air traffic between countries and their national airlines" was inconsistent with Bermuda principles. See Joint Statement of United States and United Kingdom, U.S. Department of State Press Release No. 660, September 19, 1946, App. G, infra.

that the U.K. action with respect to winter schedules was identical to the action it took with respect to summer schedules. At that time, the Department of State characterized the British action as "inappropriate and unacceptable" and stated specifically that such "unilateral action * * * violates the air services agreement" (see p. 11, supra).

In these circumstances it is clear that the Board properly determined (J.A. 4) that the U.K. action would "* * * impair, limit, terminate and deny operating rights and deny the fair and equal opportunity to exercise the operating rights provided for in * * *" the Bermuda Agreement.

The determinations of the Department of State in this area conclusively establish that the U.K.'s unilateral predetermination of the capacity in the U.S.-U.K. markets was, as far as the U.S. is concerned, a violation of the U.S.-U.K. bilateral. Such an executive interpretation of an international agreement is entitled to conclusive weight by the courts. See, e.g., Whitney v. Robertson, 124 U.S. 190 (1888); RESTATEMENT (Second) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §152 (1965), supra, n. 21. As the Court stated in Whitney:

> "Whether a treaty with a foreign sovereign * * * [has] been violated by him; * * * whether the views and acts of a foreign sovereign * * * [have] given just occasion to * * * our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise * * * [are] not judicial questions; * * * the power to determine these matters [has] not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and * * * they belong to diplomacy and legislation * * * and not to the administration of the laws." Whitney v. Robertson, 124 U.S. 190, 194-5 (1888). 26/

If the courts recognize as conclusive the Executive's answer to the political question whether a foreign sovereign has violated an agreement with the United States, the Board's reliance on such an answer is not open to criticism.

Nor is petitioner's case advanced by its semantic dispute with the findings in support of the schedule-filing order. It is urged that the schedule limitations and capacity reductions prescribed by the August 12, 1976 U.K. Note amounted to no more

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26/ As the Fifth Circuit graphically observed in Spacil v. Crowe, 489 F.2d 614, 619 (1974):

> "Perhaps more importantly, in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves. Will granting immunity serve as a bargaining counter in complex diplomatic negotiations? See Falk, the Role of Domestic Courts in the International Legal Order, 39 Indiana L.J. 429, 440 (1964). Will it preclude a significant diplomatic advance; perhaps a detente between this country and one with whom we are not on the best speaking terms? These are questions for the executive, not the judiciary."

than "proposed" action because they would not be effective until November 1, 1976. Since the Board's schedule-filing order issued in September, the carrier asserts that at that time there was no basis on which the Board could make the Part 213 finding that the U.K. had taken adverse unilateral action. 27/ The Board's response to this hypertechnical contention is answer enough:

> "Part 213, which was adopted specifically as a means to provide prompt retaliatory action in order to deter and prevent foreign government restrictions, could not reasonably be construed as requiring that full damaging effects of the foreign governments' restrictive action had actually taken place before the U.S. Government was in a position to take the appropriate retaliatory action under Part 213 procedures." J.A. 36, n. 4. 28/

27/ Specifically, petitioner contends (Br. at 38) that since Part 213 prohibits the Board from acting until after a foreign government "has taken" unilateral action that impairs, limits, terminates or denies operating rights of U.S. carriers, the Board violated that prohibition here because the schedule limitations and capacity reductions ordered by the U.K. Note on August 12, 1976 would not be effective until November 1, 1976. Consequently, the argument maintains, the Board, contrary to the regulation, in issuing its schedule-filing order in September was "* * * striking the first blow" (Id. at 39).

28/ The fact that the U.K. Note also predetermined schedules for petitioner is obviously irrelevant for purposes of Part 213. The U.K. Note was none the less unilateral action because it specified the operating frequencies of petitioner on its routes in the course of abridging the rights of U.S. carriers on their routes. We assume that the U.K. is free to impose on its wholly-owned carrier such restrictions as it may deem necessary to advance its governmental interests. However, the Bermuda agreement does not contemplate a predetermined parity of scheduling of the carriers of the two governments and, indeed, the U.S. government's resistance to this U.K. proposed concept is one of the most serious differences in the current negotiations in which the U.K. seeks a revision of the Bermuda capacity provisions (see note 6, supra).

Finally, the petitioner contends (see pp. 24, 25, supra) that the Board's schedule-filing order did not comply with Part 213 because the Board did not hold a hearing before adopting it. The short answer to this contention is that the regulation specifically authorizes the Board to act without a hearing. The fact that the Board has discretion under the regulation to proceed after a hearing does not, without more, invalidate an action otherwise specifically authorized. Nor is this a case where it can be contended that it was an abuse of discretion to not hold a hearing. The Board's order followed inter-governmental negotiations wherein the position had already been taken that the U.K. action would be the subject of Part 213 retaliation. Since the executive branch of the United States Government had determined that the instant situation was one which required Part 213 retaliatory action and had notified the British Government that such action would be forthcoming, it is clear that the initiation of Part 213 through the first stage of a schedule-filing order was purely a policy matter as to which no material disputed facts existed which required a hearing for their resolution.

CONCLUSION

The Board's orders should be affirmed.

Respectfully submitted,

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February 15, 1977

APPENDIX A

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 737, as amended, 49 U.S.C. 1301, et seq.:

TITLE IV - AIR CARRIER ECONOMIC REGULATION

* * * * *

PERMITS TO FOREIGN AIR CARRIERS

Permit Required

Sec. 402. [72 Stat. 757, 49 U.S.C. 1372] (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

* * * * *

Terms and Conditions of Permit

(e) The Board may prescribe the duration of any permit and may attach to such permit such reasonable terms, conditions, or limitations as, in its judgment, the public interest may require.

Authority to Modify, Suspend, or Revoke

(f) Any permit issued under the provisions of this section may, after notice and hearing, be altered, modified, amended, suspended, canceled, or revoked by the Board whenever it finds such action to be in the public interest. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, modification, amendment, suspension, cancellation, or revocation of a permit.

* * * * *

TITLE VII - OTHER ADMINISTRATIVE AGENCIES

THE PRESIDENT OF THE UNITED STATES

Sec. 801. [72 Stat. 782, as amended by 86 Stat. 96, 49 U.S.C. 1461] (a) The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or

any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

* * * * *

TITLE X -- PROCEDURE

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Secretary of Transportation subject to Review

Sec. 1006. [72 Stat.795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

TITLE XI -- MISCELLANEOUS

* * * * *

INTERNATIONAL AGREEMENTS

Sec. 1102. [72 Stat. 797, 49 U.S.C. 1502] In exercising and performing their powers and duties under this Act, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, and shall take into consideration any applicable laws and requirements of foreign countries and the Board shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: Provided, That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement, heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest.

APPENDIX B
70-6-32

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

- - - - - - - - - - -

Served: June 4, 1970

DOCKET 12063

FOREIGN AIR CARRIER PERMIT TERMS INVESTIGATION

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Decided: April 23, 1970

New Part 213 of the Economic Regulations adopted (1) authorizing the Board to require foreign air carriers to file their schedules with the Board and reserving power in the Board to disapprove such schedules, and (2) authorizing the Board to require foreign air carriers to file data disclosing the nature and extent of their engagement in air transportation between points in the United States and points outside thereof.

Permits of named foreign air carriers (not including Canadian transborder operators) amended to impose a condition making them subject to new Part 213.

APPEARANCES:

Same as in the examiner's recommended decision.

OPINION

BY THE BOARD:

The Board instituted this proceeding in order to determine whether it should amend foreign air carrier permits in order to enable the Board to require those carriers to file their schedules for Board approval. Noting that many foreign governments exercise analogous powers, the Board chose to examine whether it should adopt a new regulation placing it in a comparable position. The proposed Part 213 of the Economic Regulations, to which foreign air carrier permits would be made subject, would also allow the Board to direct carriers to file certain traffic data. 1/

Although the proposed regulation would empower the Board to require foreign carriers to file their schedules, the regulation would not be self-executing. Unless the Board affirmatively invoked the regulation, each foreign carrier would be entirely free to determine its schedules (including equipment) for operations to or from this country. If the Board found it necessary, however, the Board would be authorized to require schedule filings. Thereafter, the foreign carrier could continue to operate its existing schedules, or could inaugurate new schedules, unless the Board notified it that such schedules might be contrary to applicable law or might adversely affect the public interest. Where the Board so notified the carrier, the carrier could not continue

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1/ Order E-16288, January 18, 1961. The proposed regulation also incorporated certain requirements relating to the filing of airport notices and the use of business names to which the foreign air carriers were already subject under the provisions of the individual orders issuing their foreign air carrier permits.

existing schedules or inaugurate new ones unless and until the Board, upon application of the foreign carrier, so authorized.

After public hearings, Examiner Edward T. Stodola issued his decision in which he recommended that Part 213 should not be adopted and the foreign air carrier permits should not be amended as proposed. The examiner's recommendation was based in large part upon his belief that Part 213 signaled a change in the United States' historic aviation policy from one of bilateral negotiations to one of unilateral restrictions (R.D. 85-86). We have considered the entire record, including the parties' exceptions, briefs,[2/] and oral argument. The Board is of the view that the examiner misconceived Part 213's policy implications. In summary, the Board believes that the Part 213 regulation is wholly consistent with our Government's continued belief that, under the so-called "Bermuda principles," airline management should be free initially to determine for itself appropriate schedule frequencies, with ex post

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2/ Exceptions were filed by Bureau Counsel; Pan American World Airways, Inc.; Trans World Airlines, Inc.; British Overseas Airways Corporation (BOAC), British West Indian Airways Limited, and Bahamas Airways Limited, jointly; KLM Royal Dutch Airlines; Lineas Aereas Costarricenses, S.A. (LACSA), Aerovias Nacionales de Colombia, S.A., Aerovias Venezolanas, S.A. (now succeeded by Venezolana Internacional de Aviacion, S.A., transferee of its permit), and Compania Mexicana de Aviacion, S.A. (CMA), jointly; Sabena Belgian World Airlines; Scandinavian Airlines System (SAS), El Al Israel Airlines Limited, Iberia Air Lines of Spain, and S.A. Empresa de Viacao Aerea Rio Grandense, jointly; and Swissair, Swiss Air Transport Company, Limited. Briefs to the Board were filed by the Bureau, Pan American, TWA, BOAC et al., KLM, LACSA et al. (except for CMA which elected not to join in filing a brief), and Swissair, Aerlinte Eireann Teoranta (Irish International Airlines), Deutsche Lufthansa Aktiengesellschaft (Lufthansa), Japan Air Lines Company, Ltd., Sabena, and SAS et al., rely on their briefs to the examiner.

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facto governmental review through consultations. Indeed, the Board's possession of the Part 213 powers will give other governments increased incentives to refrain from unilateral restrictionism. It is for these reasons that the Board, unlike the examiner, concludes that a modified Part 213 should be adopted.[3/]

1. Part 213's schedule-filing and approval provisions will arm the Board with powers needed to combat foreign governmental restrictionism. The Board would prefer that neither this Government nor any other be equipped with the authority to predetermine capacity. But that state of affairs is not yet possible. The record demonstrates that there are a substantial number of countries which possess the power to require U.S. carriers to file schedules and to disapprove such schedules, that a number of them do not hesitate to exercise such powers, and that there have been unwarranted disapprovals of the schedules of U.S. carriers. Since the close of the record, the Board has attempted to deal with the restrictionist practices of three governments through conventional section 402 procedures involving each of those countries' carriers. Although these recent cases show

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3/ Since the time of the institution of this proceeding, the Board has adopted a new Part 215 of the Economic Regulations (ER-386, effective September 20, 1963), governing the use of business names by all foreign air carriers. We therefore will not adopt the business name provisions of the proposed Part 213.

that the problem continues unabated,[4/] they have also demonstrated the crying need for a speedier, less cumbersome procedure -- like Part 213.

The United States Government's lack of apt procedures for schedule approval has, the Board believes, encouraged other nations to take unwarranted restrictive action against United States carriers operating to their territory. For if a foreign government can limit the United States carrier's schedules, while the United States is unable to impose prompt, reciprocal restrictions on that government's carrier, the foreign carrier will gain an economic advantage. So long as the United States is forced to follow procedures under which retaliatory action is long delayed, foreign governments will not regard the threat of United States retaliation as a serious deterrent. Only by adopting Part 213 can this Government increase the likelihood that other governments will abandon unilateral restrictionism.

The parties have expressed a concern that the Board might use Part 213 to impose unilateral restrictions against foreign flag carriers which schedule excess capacity in violation of Bermuda-type

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4/ Alitalia-Linee Aeree Italiane, Order E-26156, adopted December 21, 1967; Aerolineas Argentinas, Order 69-2-112, approved by the President February 20, 1969; Philippine Air Lines, Order 69-11-61, adopted November 14, 1969. Although the record in the instant proceeding was closed some years ago, and is outmoded regarding some subsidiary issues (like traffic participation), the passage of time has not significantly altered the facts on the fundamental issue -- the foreign governments' power to restrict U.S. carrier capacity, and their exercise of that power. The Board therefore rejects any notion that the record is stale for decisional purposes.

bilateral agreements. 5/ As the Board has emphasized, however, it has never intended to substitute its Part 213 powers for the Bermuda plan of initial management discretion, with subsequent ex post facto governmental review. In order to clarify the Board's intentions, the Board

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5/ The Bermuda capacity principles are incorporated in the U.S. standard form air transport agreement in the following form:

"ARTICLE 8

"There shall be a fair and equal opportunity for the airlines of each contracting party to operate on any route covered by this Agreement.

"ARTICLE 9

"In the operation by the airlines of either contracting party of the trunk services described in this Agreement, the interest of the airlines of the other contracting party shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes.

"ARTICLE 10

"The air services made available to the public by the airlines operating under this Agreement shall bear a close relationship to the requirements of the public for such services.

"It is the understanding of both contracting parties that services provided by a designated airline under the present Agreement shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the countries of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in this Agreement shall be applied in accordance with the general principles of orderly development to which both contracting parties subscribe and shall be subject to the general principle that capacity should be related:

"(a) to traffic requirements between the country of origin and the countries of ultimate destination of the traffic;

"(b) to the requirements of through airline operation; and,

"(c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services."

will modify the rule to provide that the Board may issue a schedule-filing order in bilateral cases only if it finds[6/] that the carrier's government has, over this Government's objections, restricted a United States carrier's operating rights provided for in an air transport agreement. This change, we hope, will reassure our bilateral partners that the Board will not invoke the rule against their carriers unless those governments themselves first practice unilateral restrictionism.

In the case of countries which do not have air transport agreements with the United States, the problem is more complex. While in such cases the United States will continue to urge that aviation relations between the two countries be guided by the Bermuda plan of ex post facto review, those foreign countries have not committed themselves to follow those procedures in resolving capacity disputes. The Board will therefore adopt Part 213 in a form which gives it powers comparable to the foreign governments' in non-bilateral cases. For both bilateral and non-bilateral situations, the Board will further amend the proposed rule by making Board schedule-disapproval orders subject to Presidential disapproval.

While the foreign carriers strongly oppose the regulation, they have not established that it is unreasonable, and they could not establish that they will be hurt by its adoption. In and of itself, the regulation imposes no new obligations on any carrier, nor does it restrict in any way the present operations of any carrier. It merely equips the Board with machinery for taking action against individual carriers in

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6/ The orders and notices provided for in the regulation may be issued by the Board pursuant to informal procedures with or without hearing.

appropriate cases. In the final analysis, therefore, the foreign carriers' objection rests on the assumption that this Board will exercise its Part 213 powers arbitrarily, or in contravention of our Government's international obligations, and historic international aviation policies. For the reasons stated, this would not, and indeed could not, be the case. Moreover, the regulation affords any foreign air carrier whose schedules may be the subject of Board regulation a full opportunity to present to the Board all matters of fact and law which it considers pertinent. The Board will give full consideration to carrier presentations in reaching its decisions.

2. The traffic data provisions of the regulation would enable the Board to obtain data which are clearly needed and which the Board may reasonably require the foreign carriers to furnish. We are of the view, as was the examiner, that the evidence in the proceeding demonstrates the shortcomings of available statistical sources covering the U.S. traffic of foreign carriers. We also believe that power to obtain more complete air traffic data is required to aid the Board in its regulatory duties under the Act, and to help the United States solve the manifold problems of route development, economic forecasting, and travel promotion.

We find no merit in the argument that the Board cannot adopt the traffic data provisions because bilateral air transport agreements do not specifically provide for the furnishing of traffic data. Most of them do not. On the other hand, none of them contains any specific provision prohibiting such action. Therefore, if a prohibition is to be found, it must rest on the intent of the contracting parties. We are aware of

nothing that would show such an intent. The widespread practice of other nations that are parties to agreements with the United States in requiring the filing of traffic statistics of various kinds indicates a broad acceptance of the propriety of such a requirement. This practice also demonstrates that the filing of traffic data would not be an unreasonable burden to be imposed upon foreign carriers.

Moreover, requiring traffic data is entirely reasonable under the plan of the bilateral agreements. Where two countries have entered into an agreement providing for the observance of certain capacity principles, and for consultation to resolve problems that may arise in the application of such principles, we can see no reasonable basis for contending that either party may not inform itself on the question of whether the agreement is being observed or breached. Without traffic information there is no intelligent way for either contracting party to decide whether it believes the agreement is being violated and whether it should request consultation.

The rule provides that the Board order directing the filing of traffic data will specify the traffic data required to disclose the nature and extent of the carrier's engagement in transportation between points in the United States and points outside thereof. Thus, the question of the appropriate form for such traffic data is one to be resolved in accordance with the requirements of the particular case at hand. Although various foreign carriers have opposed the furnishing of a particular type of traffic data as not pertinent, it may be observed that the submission of data by a foreign carrier in accordance with Board requirements would

not constitute a concession that such data were appropriate for any particular use. Its government would remain free to press its view in subsequent consultations that those data, or any other data that the United States may seek to rely on, are not relevant or material in applying Bermuda capacity principles.

In sum, we are convinced that the proposed regulation will meet a public need and that there are no countervailing considerations that should lead us to withhold adoption.

3. We reject the contentions of the foreign air carriers that the Board lacks the power to promulgate the regulation and to amend their permits. Their arguments on this point are, in all substantial respects, the same as the arguments which the Board has previously considered and rejected.[7/] After further considering the arguments in the light of the record here, we again conclude that they should be rejected for the reasons heretofore given.

We have considered all other exceptions to the recommended decision and contentions of the parties and find that they should not alter our decision herein.[8/]

7/ Prior to the hearings in the case, the Board denied the motions of various foreign carriers to dismiss the proceeding for lack of jurisdiction, Orders E-17235 and E-17537, July 27 and October 4, 1961. Subsequently, the Court of Appeals dismissed a petition of the foreign carriers for review of the Board's orders (British Overseas Airways Corp. v. CAB, 304 F.2d 952 (C.A.D.C., 1962)), and the District Court of the District of Columbia dismissed a complaint seeking to enjoin the Board from proceeding. BOAC v. CAB, Civil Action 3315-62, January 9, 1963.

8/ We will revise the originally-proposed rule to change various specified time periods from 20 to 30 days.

Accordingly, in view of the foregoing and all the facts of record, we find:

1. That the public interest requires the adoption and concurrent issuance of a new Part 213 of the Board's Economic Regulations as set forth in appendix 1 of the attached order;

2. That the public interest requires that the foreign air carrier permits of the foreign air carriers named in appendix A of the attached regulation [9/] be amended to make the exercise of the privileges granted by such permits subject to the provisions of said Part 213, [10/] and that all foreign air carrier permits issued after the effective date of the attached order also be subject to that Part; and

3. That this investigation should be terminated.

An appropriate order will be entered.

BROWNE, Chairman, GILLILLAND, Vice Chairman, MINETTI, MURPHY, and ADAMS, Members of the Board, concurred in the above opinion.

9/ We see no need to make Part 213 applicable to the Canadian transborder carriers who, by the terms of their permits, are limited to the use of small aircraft and to operations on a casual, occasional, and infrequent basis, and we therefore will not amend their permits.

10/ We will make the new Part 213 and the foreign air carrier permit amendments effective 60 days after Presidential approval of the attached order.

Order 70-6-32

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 23rd day of April, 1970

FOREIGN AIR CARRIER PERMIT TERMS INVESTIGATION	Docket 12063

O R D E R

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusion, and decision;

IT IS ORDERED:

1. That there be and hereby are adopted and issued concurrently herewith regulations of the Board designated Part 213 of the Economic Regulations, which are attached hereto and made a part hereof;

2. That the foreign air carrier permits of the foreign air carriers named in Appendix A to the attached Part 213 regulations be and they hereby are amended so as to make the exercise of the privileges granted by said permits subject to the provisions of said Part 213;

3. That said Part 213 and said foreign air carrier permit amendments shall be effective June 4, 1970;

4. That, to the extent that prior orders of the Board issuing foreign air carrier permits to the named foreign air carriers made such permits subject to the terms, conditions, and limitations of Part 203 of the Economic Regulations, such orders be and they hereby are to that extent revoked, effective upon the effective date of the permit amendments ordered herein;

5. That this investigation be and it hereby is terminated;

6. That this order shall become effective upon the date of its approval by the President of the United States.

By the Civil Aeronautics Board:

HARRY J. ZINK

Secretary

(SEAL)

THE WHITE HOUSE

APPROVED:

RICHARD NIXON

June 3, 1970

No. 147

APPENDIX C

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honor to refer to their Note No. 97 dated 11 May 1976 about air transport capacity to be provided on North Atlantic routes.

In that Note, the Government of the United Kingdom of Great Britain and Northern Ireland made clear the importance they attached to avoiding the provision of excess capacity on North Atlantic routes during the winter period of 1976/77 and thereafter. They regret that despite their efforts and the efforts of British Airways, it has not proved possible to obtain agreement regarding the capacity to be provided during the coming winter. It was stated in the Note that failure to conclude such agreement by 31 July 1976 would lead Her Majesty's Government to take whatever measures might at the time prove necessary to ensure that close relationship between capacity and demand for which provision is made in the Bermuda Agreement and the subsequent Understandings.

As a result of the discussions between delegations in mid-July and information subsequently given by the leader of the United States delegation, Her Majesty's Government are reluctantly prepared to accept the level of capacity currently planned on the routes between London and New York, Boston, Los Angeles, Philadelphia, Washington and Detroit as set out in the Annex to this Note. However, on two city-pair routes, London/Miami and London/Chicago the levels of capacity now planned for the forthcoming winter period will not bear that close relationship to the requirements of the public for air transport which is required by paragraph (3) of the Final Act of the Bermuda Civil Aviation Conference of 1946 and confirmed in the subsequent Understandings. Her Magesty's Government had therefore decided to require the airlines concerned to conform to the following levels of capacity on these two city-pair routes during the forthcoming winter period from 1 November 1976 to 23 April 1977:-

(A) On the route between London and Miami, British Airways and National Airlines shall each operate not more than 5 services per week with wide-bodied aircraft in each direction;

(B) On the route between London and Chicago, British Airways and Trans World Airlines shall each operate not more than 4 wide-bodied aircraft in each direction.

/The

The resultant capacities on all North Atlantic routes are set out in the Annex to this Note.

The airlines are being informed accordingly.

Her Britannic Majesty's Embassy avail themselves of this opportunity to renew the assurances of their highest consideration.

(SEAL)

BRITISH EMBASSY

WASHINGTON

12 August 1976

ANNEX TO
NOTE NO 167

CAPACITIES FOR US AND UK AIRLINES ON NORTH ATLANTIC ROUTES WINTER 1976/77

Between London and:	Maximum Level of Capacity per week in each direction between 1 November 1976 and 23 April 1977		
	US Airlines	UK Airlines	Total
Los Angeles	7WB	7WB	14WB
Boston	4WB + 7NB	7NB	4WB + 14NB
Chicago	4WB	4WB	8WB
New York	21WB + 7NB	7WB + 7NB + 7CC	28WB + 14NB + 7CC
Washington	7WB (Note 2)	5WB + 3CC	12WB + 3CC
		or	or
		6WB + 2CC (Note 3)	13WB + 2CC
Detroit	4WB (over Boston)	4WB (over Washington)	8WB
Philadelphia	7NB	7NB (over Boston)	14NB
Miami	5WB	5WB	10WB

Notes: (1) WB = Wide-bodied aircraft, B747 - DC10 - L1011
NB = Narrow-bodied aircraft, B707 - DC8 - VC10
CC = Concorde

(2) Of which, not more than 5 WB will be direct and 2 WB over New York.

(3) Of which, not more than 4WB will be direct and the remaining 1 or 2 WB over New York.

BRITISH EMBASSY
WASHINGTON
12 August 1976

LIMITED OFFICIAL USE

EB/TCA:JUBILLER
10/7/76 21498
EB/TCA:JWBILLER

EUR/NE:NACHILLES

RO•MELIA - CAB {INFORMED}

NIACT IMMEDIATE LONDON

PRIORITY TOYKO

JWB

TOKYO FOR STYLES

JWB

E.O. 11652: N/A

JWB

TAGS: EAIR, UK

NA

SUBJECT: US-UK AVIATION DISPUTE

1. DISCUSSIONS WE HAVE HAD WITH BRITISH EMBASSY IN WASHINGTON ON BASIS OF LATEST FREQUENCY PROPOSALS OF U.S. AIRLINES FOR WINTER SEASON BEGINNING NOV. 1 HAVE LED TO BRITISH AGREEMENT TO RESCIND UNILATERAL ORDER LIMITING CHICAGO-LONDON AND MIAMI-LONDON CAPACITY.

2. EMBASSY SHOULD DELIVER FOLLOWING LETTER TO GEORGE ROGERS {DOT} AS SOON AS POSSIBLE THURSDAY:

QTE: DEAR GEORGE: THIS IS TO INFORM YOU OF THE PLANS OF TRANS WORLD AIRWAYS AND NATIONAL AIRLINES FOR FREQUENCIES ON CHICAGO-LONDON AND MIAMI-LONDON RESPECTIVELY FOR THE WINTER SEASON BEGINNING NOVEMBER 1, 1976.

TWA PLANS TO FLY FIVE FREQUENCIES PER WEEK IN EACH DIRECTION EXCEPT FOR THE PERIOD JANUARY 15 - MARCH 15, DURING WHICH IT PLANS TO FLY FOUR FREQUENCIES PER WEEK. NATIONAL PLANS TO FLY SIX FREQUENCIES PER WEEK IN EACH ALL DIRECTION EXCEPT {A} ONE WEEK IN DECEMBER AND ~~ONE MONTH~~ OF FEBRUARY, DURING WHICH IT PLANS TO FLY FIVE FREQUENCIES PER WEEK AND {B} ONE WEEK IN DECEMBER AND ONE WEEK IN JANUARY, DURING WHICH IT PLANS TO FLY SEVEN FREQUENCIES PER WEEK.

LIMITED OFFICIAL USE

THESE PLANS ARE BASED ON THE ASSUMPTION BY THE AIRLINES THAT BRITISH AIRWAYS WILL FLY MATCHING FREQUENCIES AND, FURTHER, THAT BRITISH AIRWAYS ON MIAMI-LONDON WILL TAKE STEPS TO EQUATE THE CAPACITY OF ITS B-747'S TO THAT OF NATIONAL AIRLINES DC-10'S. EACH AIRLINE WILL BE FREE TO SELECT THE DAYS OF THE WEEK ON WHICH IT CHOOSES TO FLY.

I UNDERSTAND THAT THE FOREGOING PLANS ARE SATISFACTORY TO YOU AND, CONSEQUENTLY, THAT YOU WILL RESCIND THE ORDER PREVIOUSLY ISSUED TO TWA AND NATIONAL WITH REGARD TO CAPACITY FOR THE FORTHCOMING WINTER SEASON. I WOULD APPRECIATE RECEIVING A CONFIRMATION OF THIS UNDERSTANDING AS SOON AS POSSIBLE. FOR OUR PART, AS SOON AS THE ORDER TO TWA AND NATIONAL IS RESCINDED, WE WILL TAKE THE ACTION NECESSARY TO ASSURE THAT THE PROPOSED CAB ORDER AFFECTING BRITISH AIRWAYS OPERATIONS IN LOS ANGELES IS WITHDRAWN OR DISAPPROVED. SINCERELY YOURS, JOEL W. BILLER, DEPUTY ASSISTANT SECRETARY. UNQUOTE.

3. IN TRANSMITTING LETTER, EMBASSY SHOULD MAKE POINT OF MENTIONING TO ROGERS THAT WE AND GORDON-CUMMING OF BRITISH EMBASSY HAVE AGREED TO MEET EARLY NEXT WEEK TO NEGOTIATE REASONABLE FIFTH FREEDOM TRAFFIC LEVELS FOR PANAM ON HONG KONG-SYDNEY. WE ARE CONFIDENT THAT WE CAN AGREE ON MUTUALLY SATISFACTORY LEVEL, WHICH PANAM WILL ABIDE BY UNTIL IT TERMINATES ITS HONG KONG-SYDNEY SERVICE ON FEBRUARY 1, 1977.

4. IF FEASIBLE, WE WOULD LIKE RESPONSE FROM ROGERS THAT WOULD REACH US PRIOR TO C.O.B. THURSDAY, OCT 7. IN ANY CASE, EMBASSY SHOULD REPORT ON ITS CONVERSATION WITH ROGERS BY CABLE WHICH WILL REACH DEPARTMENT BY THAT TIME.44

DEPARTMENT OF TRADE
SHELL MEX HOUSE STRAND
LONDON WC2R 0DP
Telephone Direct Line 01-[illegible] 4524
Switchboard 01-[illegible] 5000

8 October 1976

Joel W Biller Esq
Deputy Asst Secretary for
Transportation and Telecommunications
Department of State
Washington DC

Dear Joel.

Thank you for your letter of 7 October, setting out the capacity that Trans World Airlines and National Airlines now plan to operate on the London-Chicago and London-Miami routes during the coming Winter season. British Airways plan to provide matching capacity, although it will be left to their reasonable discretion how they match National's additional and fewer frequencies on the Miami route in December and January.

I confirm that these arrangements (which will continue until 23 April 1977 for Chicago and 30 April 1977 for Miami) are acceptable to us. We are writing to TWA and National today to inform them accordingly.

I am glad that this problem has now been settled to our mutual satisfaction, and look forward to meeting you again on 18 October to continue our work on the new Agreement.

Yours sincerely

George

(G T ROGERS)

APPENDIX E

DEPARTMENT OF TRADE SBW/1/75

AIRLINE OPERATING PERMIT

1 For the purposes of Article 79 of the Air Navigation Order 1974 the Secretary of State hereby grants to Seaboard World Airlines Inc. (hereinafter referred to as "Seaboard") permission to take on board and discharge cargo (including mail) at the points in the United Kingdom specified in column 3 of the following Table, being cargo (including mail) carried or to be carried for hire or reward on scheduled services to be operated as follows:-

(1) an eastbound service between points selected from columns 1, 2, 3 and 4 of the said Table, to be served in that order; and

(2) a westbound service between points selected from columns 4, 3, 2 and 1 of the said Table, to be served in that order,

points being included or omitted in accordance with the headings of the said columns;

TABLE

Points of Departure (any one or more of the following)	Intermediate Points (either or both the following if desired)	Destinations in UK Territory (either or both the following)	Points Beyond (any one or more of the following if desired)
(1)	(2)	(3)	(4)
Boston New York Philadelphia Baltimore Washington Detriot Chicago	Gander Shannon	London Prestwick	Amsterdam Copenhagen Norway Sweden Hamburg Cologne Dusseldorf Frankfurt Stuttgart Munich

2 This permission is granted subject to the following conditions:

(a) before taking on board or discharging any cargo (including mail) Seaboard shall have furnished to the Secretary of State, at least 60 days before they are due to take effect, Schedules showing the services on which cargo (including mail) is to be carried pursuant to this permission and such Schedules shall have been approved with or without modification by the Secretary of State. The services shall only be held in accordance with Schedules which have been so approved: and

(b) The prices to be paid for the carriage of cargo hereby permitted to be taken on board and discharged in the United Kingdom and the conditions under which those prices apply, in particular rates of agency commission and conditions for agency and auxiliary services but excluding remuneration and conditions for the carriage of mail, shall be those that are for the time being approved by the Secretary of State.

3 This permit shall remain in force until suspended or revoked.

I D S Brown
For the Secretary of State

17 September 1975

APPENDIX F

CIVIL AERONAUTICS BOARD

November 29, 1976

Mr. Philip Schleit
Schleit & Jaycox
Attorneys at Law
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Schleit:

This is to advise you that the Board, pursuant to Part 213 of the Economic Regulations, has granted Ecuatoriana's request for a waiver of the 30-day notice provision to operate, effective December 1, 1976, pursuant to the schedules filed on November 11 and 18, 1976. The Board has also granted Ecuatoriana's request for authority to operate three extra sections in the Ecuador-New York market on Deceber 6, 13 and 20, 1976 respectively.

For the Civil Aeronautics Board:

Phyllis T. Kaylor
Secretary

APPENDIX G

U.S DEPARTMENT OF STATE

PRESS RELEASE NO. 660
SEPTEMBER 19, 1946

JOINT STATEMENT OF UNITED STATES AND UNITED KINGDOM

The Department of State today released the following text of a joint statement relating to the international air transport policy of the United States and British Governments.

The statement also is being released simultaneously by the British Government:

1. During the visit of United States aviation officials to the exhibition of the Society of British Aircraft Constructors in London between September 11 and 15, 1946, the opportunity was taken to arrange informal discussions with the Minister of Civil Aviation and representatives of the Ministry and the Foreign Office.

2. The discussions centered on developments in the field of international air transport since the conclusion of the United States - United Kingdom Air Transport Agreement at Bermuda on February 11, 1946.

3. Both parties are in accord that experience since the Bermuda agreement has demonstrated that the principles enunciated in that agreement are sound and provide, in their view, a reliable basis for the orderly development and expansion of International Air Transport. They believe that these principles provide the basis for a multilateral international agreement of the type that their representatives at the meeting of the PICAO Assembly in May advocated as being in the interests of international air transport.

4. Consequently, both parties believe that in negotiating any new bilateral agreements with other countries, they should follow the basic principles agreed at Bermuda, including particularly

(A) fair and equal opportunity to operate air services on international routes and the creation of machinery to obviate unfair competition by unjustifiable increases of frequencies or capacity;

(B) the elimination of formulae for the predetermination of frequencies or capacity or of any arbitrary division of air traffic between countries and their national airlines;

(C) the

(C) the adjustment of Fifth Freedom traffic with regard to:

(1) traffic requirements between the country of origin and the countries of destination,

(2) the requirements of through airline operation, and

(3) the traffic requirements of the area through which the airline passes after taking account of local and regional services.

5. The representatives of the two countries were united in the belief that until a multilateral agreement should be adopted, the Bermuda type of agreement represents the best form of approach to the problem of interim bilateral agreements.

6. In furtherance of the foregoing principles each government is prepared upon the request of any other government with which it has already concluded a bilateral air transport agreement that is not deemed to be in accordance with those principles to make such adjustments as may be found to be necessary..

7. Arrangements have been completed for setting up the machinery envisaged in the Bermuda conversations for continuous consultation and exchange of view between the two countries on civil aviation problems. Mr. Laurence Vass has been appointed as representative of the Civil Aeronautics Board with the Ministry of Civil Aviation in London. Mr. Nigel Bicknell has been appointed as representative of the Ministry of Civil Aviation with the Civil Aeronautics Board in Washington.

The United States representatives at the discussions included: Mr. James M. Landis, chairman of the Civil Aeronautics Board; Mr. William A. M. Burden, Assistant Secretary of Commerce for Air; Mr. Garrison Norton, Director of the Office of Transport and Communications Policy of the Department of State; Mr. George A. Brownell, Personal Representative of the President to the Middle East and India in connection with air agreements; Mr. Livingston Satterthwaite, Civil Air Attache of the United States Embassy in London.

The United Kingdom representatives included Lord Winster, Minister for Civil Aviation; Mr. Ivor Thomas, Parliamentary Secretary, Sir Henry Self, Permanent Secretary, and Mr. Peter Masefield, Civil Air Attache at the British Embassy in Washington.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD, Petitioner,	:	
v.	:	No. 76-4226
CIVIL AERONAUTICS BOARD, Respondent.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served respondent's printed brief by causing two copies thereof to be mailed in a properly addressed, franked envelope to the following:

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February 22, 1977